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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 904

In the Matter

—of—

The Petition of MOORE-McCORMACK LINES, INC., as owner of the S.S. MORMACKITE, for exoneration from or Limitation of Liability.

ARMCO STEEL CORPORATION and WESSEL DUVAL & CO., INC.,

Cross-Petitioners,

MOORE-McCORMACK LINES, INC.,

Cross-Respondent.

CROSS-RESPONDENT'S BRIEF

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CROSS-RESPONDENT'S BRIEF

Cross-respondent prays that this petition be considered with its own petition for a writ of certiorari in No. 871, inasmuch as the two petitions are made in the same proceeding and involve the same decisions.

As to Questions 1, 2 and 3

The Court of Appeals reversed, and allowed Moore-McCormack to limit liability as to cargo claims, because it found that the District Court was plainly wrong in deciding that the vessel's stabilogauge was wrongly calibrated.

The District Court found that the stabilogauge was procured for the vessel in 1945 and was calibrated to her structure as then existing. There was *no evidence whatsoever* to support this finding and we are amazed at Armco's unjustifiable assertion (petition, p. 11) that the Court's "finding was supported by the evidence before it." This is not so.

A little of the pre-trial history of this proceeding is necessary to a full understanding. At pre-trial the Court held that claimants had the burden of proof on issues of liability (12a-13a). Moore-McCormack urged the Court on several occasions to require claimants to disclose what grounds of liability they asserted. The Court refused (8a-9a). When the case was called for trial we told the Court that we were not prepared to go to trial because we did not know on what grounds claimants predicated liability, but the Court nevertheless directed us to proceed (14a-16a, 19a-21a).

If, as Armco suggests in Question 2, there is anything in this case which calls for an exercise of this Court's power of supervision, it is the District Court's requiring Moore-McCormack to go to trial without a disclosure of the bases of the claims of liability. To add insult to injury the Judge required Moore-McCormack to go first with its proofs although it occupied the position of a defendant and claimants had the burden of proof, and then based his decision on findings as to the stabilogauge, without evidence and as to which there was no issue. In these days of enlightened pre-trial procedures, we consider this shocking and unjust.

Moore-McCormack offered no evidence as to the calibration of the stabilogauge because the burden of proof of unseaworthiness was on claimants and, since they put in no evidence on the point, and did not assert that the stabilogauge was wrongly calibrated, there was no occasion

to do so. This was particularly true because Armco was in possession of positive evidence as to exactly how the stabilogauge was calibrated, and when it was made. The claimants as a group, including Armco, *before trial*, took the deposition of Robert M. Kristal, president of the company that made the instrument. He testified that it was "purchased for the MORMACKITE" and shipped on August 8, 1947. This was two years after the District Court found that it was bought. He also testified to exactly what vessel characteristics it was calibrated (7a).

Because of the District Court's egregious error as to the stabilogauge, we moved immediately following the filing of its opinion for a reconsideration and proffered the Kristal deposition. McGohey, *J.*, denied the motion without opinion. We promptly moved in the Court of Appeals for leave either to take Kristal's testimony or to have the Court consider his deposition previously taken. While the Court of Appeals in form "denied" our motion, it said:

> "Appellant may of course argue as to the claimed effect of the excluded evidence in presenting its appeal" (App. B., 22-3).

This was full permission to Moore-McCormack to bring the deposition to the attention of the Court on argument and fully justifies its inclusion in the printed record. Armco's assertions (*e.g.*, petition, p. 12) that it had been ruled that the deposition was not a part of the record, flatly misrepresent the situation.

It is patent, therefore, that the District Court was completely wrong in finding that the stabilogauge was calibrated to the vessel's characteristics in 1945, and that the Court of Appeals had no alternative but to find that the District Court was plainly wrong.

Although it has had full opportunity to do so, Armco has not had the temerity to assert that it has or can get any evidence to show that the District Court's finding as to how the 'gauge was calibrated was right.

Moreover, the gravity of the District Court's error in basing its decision on the stabilogauge although the parties were not in dispute over its adequacy during trial is demonstrated by the fact that, if it had been calibrated as the District Court found, the error it would have contained, in terms of "G M" (the conventional yardstick of stability) would have been only 1/10 of a foot. We demonstrated to the Court of Appeals that we can prove this by the testimony of the scientist who invented the stabilogauge. Armco's expert testified that a GM of from 1.0 to 3.25 feet and beyond would be proper (535-6a). Obviously a variation of 1/10 foot is wholly unimportant.

Present expressions of interest in "administration of justice" sound strange, indeed, coming from cross-petitioners who sat back below knowing that the District Court had made a glaring error of fact, but hoping to hold the decision in their favor on appeal by inducing the Court of Appeals to shut its eyes to the truth, as developed in a deposition taken by cross-petitioners themselves. Fortunately, appellate judges are not ostriches and none of the rules referred to by cross-petitioner even purports to make them so.

In fact, cross-petitioners evade even mentioning the one and only rule applicable, namely, Supreme Court Admiralty Rule 45. This evasion cannot be excused as inadvertent, since the Court of Appeals itself based its decision expressly and squarely on "Admiralty Rule 45" (Petitioner's Appendix B, p. 31).

Nor do the cross-petitioners attempt to explain how the Court of Appeals' acceptance of the Kristal deposition

could conceivably "lead to disruption of the administration of justice" in other Courts of Appeals, the majority of which have expressly provided in their own rules for admission of depositions on appeal. For example, see Rule 14 of the First Circuit and Rule 23 of the Third Circuit. See also Rule 32 of the Ninth Circuit, Rule 12 of the Fifth Circuit and Rule 10 of the Sixth Circuit. *The Silverpalm*, 9 Cir., 79 F. 2d 598; *Isthmian S.S. Co.* v. *Martin*, 4 Cir., 170 F. 2d 25.

If "administration of justice" is the goal, as claimed by cross-petitioners, the one way *not* to achieve it is to preclude the Court of Appeals from correcting a glaring mistake of fact made below, and no matter how they may disguise it, this is what cross-petitioners ask this Court to do here.

Armco raises three other questions, all of fact, in hopeful support of its Questions 1-3:

Armco asserts that the District Court found that Barrett was an unreliable witness (p. 14). This is a misrepresentation. In fact the District Court accepted Barrett's testimony. In inviting Moore-McCormack to reply to Armco's petition for rehearing, the Court of Appeals put two questions to us, the first of which was—

> "(1) Whether the cause should be remanded to Judge McGohey to make a finding that Barrett warned the master of the amount to be 'cranked' into the stabilogauge; * * *"

Doubtless this question was put because Armco had argued to the Court of Appeals, as it now does to this Court, its own conception of the District Judge's views on Barrett's credibility. Our answer to this question obviously satisfied the Court of Appeals—so much so that it found no need

to mention the matter in its opinion of April 4, 1960 denying Armco's petition for rehearing.

Armco asserts that the prior practice of stowing ore has a bearing on the issues (petition, pp. 14-15). This is, at most, another question of fact and, singularly inappropriate in this Court inasmuch as the District Court made no finding on the point and the Court of Appeals said the evidence would not have justified a finding in Armco's favor (App. B, p. 19). However, in this connection, Armco is guilty of another flagrantly misleading assertion (petition, p. 15), viz., that it was Moore-McCormack's "position that it was customary for vessels to carry ore coned up as it was on the MORMACKITE." This statement is quite unjustifiable. That was never Moore-McCormack's position and Armco's proctors know it well. Moore-McCormack's position has been, throughout, that the ore on the MORMACKITE *was not coned up at all.*

The extent to which Armco resorts to fact issues to support its petition appears from another unjustifiably wrong assertion. Armco says the District Court found that the vessel "was probably inherently unstable" (petition, p. 6). This is said in a context which can only have been intended to suggest that the vessel was *structurally* unstable. However, the District Court's finding related to her stability as loaded for the final voyage, i.e., stability as affected by the manner in which the ore had been stowed (697a). Armco's own expert admitted that C2-S-B1's are inherently stable (477-8a). He did not challenge the stability figures of Moore-McCormack's expert, Wilson, and the Court accepted these (330-5a, 702-3a, 705a, 706a).

As to Question 4

Armco's Fourth Question would have this Court review the singularly narrow issue of the proper construction of the charter party contract between Moore-McCormack and Armco—a matter of no interest to anyone else, not even the other cross-petitioner, Wessel-Duval, whose cargo of cocoa beans was carried under a bill of lading.

Nor does the Court of Appeals' construction of the Armco charter conflict with, or even vary from, decisions of other Courts interpreting different contracts made on different terms.

Reference here to cases involving the implied warranty of seaworthiness are wholly beside the point for the simple reason that there is none where, as here, the carrier's obligation is expressed. Similarly, as to the so-called "express warranty" in Clause 2 of the charter which, as both Courts below held, did not purport to state Moore-McCormack's carrier obligations in respect to stowage and seaworthiness, the same being defined by incorporation of COGSA in the charter. Needless to add, the *main* thrust of COGSA is to cut down the carrier's obligation to exercise due diligence. Title 46 U. S. C. §1303.

Nor is there anything "remarkable" (cross-petition, p. 19) about the Court's applying the Clause 2 warranty to the ship before she loaded at Vitoria and we venture to say that Armco would not be so ready to disclaim "interest" in her then, in a breach of contract case arising from the ship's failure to "proceed" to Vitoria.

Equally beside the point are cross-petitioner's references to decisions that the charter party is the contract of carriage, between shipowner and charterer, with the bill of lading serving only as a receipt. Neither the District Court

nor the Court of Appeals found COGSA applicable because of its incorporation in any bill of lading but because the Act was incorporated in the charter party itself, the contract of carriage (722a), citing *U. S.* v. *Wessel Duval & Co.*, S. D. N. Y., 115 F. Supp. 678. The English rule is the same. *Anglo-Saxon Petroleum Co.* v. *Adamastos*, H. L. [1959] A. C. 133. Furthermore, the personal contracts doctrine never extends "to promises to do acts necessarily performed through the intervention of others." *The No. 34*, 2 Cir., 25 F. 2d 602, 607; *The Eastland*, 7 Cir., 78 F. 2d 984, 986, cert. den. 297 U. S. 703; *The Ice King*, 2 Cir., 261 Fed. 897; *The Soerstad*, S. D. N. Y., 257 Fed. 130. And here the charter made it expressly clear that loading was to be done by stevedores appointed by "*Charterers*," i.e., Armco (Cl. Ex. 1, Clause 37).

Finally, as the Court of Appeals correctly noted, the incorporation of COGSA would be wholly ineffective unless there was limitation of liability in the absence of privity or knowledge of the shipowner. Title 46 U. S. C. §1308. *Cf. The Galileo*, 2 Cir., 54 F. 2d 913, 916, aff'd 287 U. S. 420; *The Yungay*, S. D. N. Y., 58 F. 2d 352, 357.

Armco has no higher status than Wessel-Duval (or for that matter, any other shipper) whose rights are also controlled by COGSA and cross-petitioners concede, as they have to, that Wessel-Duval cannot evade limitation by relying upon any personal contract theory.

If This Petition Is Granted, Moore-McCormack's Petition in No. 871 Should Be Granted

Armco's petition (No. 904) is based fundamentally upon an alleged error of the Court of Appeals in finding that the stabilogauge was properly calibrated and holding that the District Court was plainly wrong in holding that it was not properly calibrated. The District Court's error underlies the finding of both Courts on which liability was pitched, namely that the ore was badly stowed. Armco itself concedes (cross-petition, p. 7) that one of the "salient facts" found by the District Court was that "the defective stabilogauge caused the vessel to be improperly stowed."

Since the foundation stone of the District Court's finding of liability was a miscalibrated stabilogauge, who can say what his finding would have been as to the propriety of the stowage if he had not felt that the officers were misled by the stabilogauge? True, in his opinion he put some weight on the testimony of the survivors as to how the ore was stowed and some weight on the fact that the ore shifted. It is impossible, however, to say what weight he would have given to these hotly disputed issues if he had known that the officers were not misled by the stabilogauge.

If this Court should decide that the Court of Appeals was wrong in correcting, without remand, the District Court's error concerning the stabilogauge, the entire cause should be remanded to the District Court for retrial of all the issues, including whether the stowage was proper and what caused the loss. Clearing up the District Judge's erroneous conception should persuade him that the stowage was in fact proper and that the true cause of the vessel's capsize was the negligent increase of speed in the storm. Liability to personal injury and death claimants will then

remain, but limited to the amount fixed by the Act, Title 46, U. S. Code, Sec. 183b, about $600,000.

Moreover, it seems that the District Court could not have exonerated the chief mate for bad stowage if it had known that he was not misled by the stabilogauge. We do not understand how the Court of Appeals can justify granting recovery to the chief mate's estate, or at least full recovery, in the light of its finding that he was not misled by the stabilogauge.

The foregoing considerations demonstrate, we submit, that the stabilogauge issue so underlies and permeates the entire case that if Armco's petition is granted, Moore-McCormack's petition should likewise be granted.

Dated New York, N. Y.
May 10, 1960

Respectfully submitted,

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